PD-1292-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/27/2019 12:32 PM
Accepted 12/30/2019 10:59 AM
DEANA WILLIAMSON
CLERK

NO. _____

IN THE

# COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
12/30/2019
DEANA WILLIAMSON, CLERK

OF TEXAS
AUSTIN, TEXAS

## FREDERICK L. BROWN

APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE

# APPELLANT'S PETITION FOR DISRETIONARY REVIEW

NO. 06-19-00082-CR
COURT OF APPEALS
FOR THE SIXTH DISTRICT OF TEXAS
AT TEXARKANA

On appeal from Cause Number 47,806-A
in the 188th District Court of Gregg County, Texas
Honorable Scott Novy, Judge Presiding

Vincent Christopher Botto: 300 North Green St. Suite 315 Longview, TX 75601

ATTORNEY FOR APPELLANT

APPELLANT REQUESTS ORAL ARGUMENT

## IDENTITY OF PARTIES AND COUNSEL

Appellant certifies that the following is a complete list of all parties to the trial court's judgment and the names and addresses of their trial and appellate counsel.

| | |
|---|---|
| Presiding Judge: | The Honorable Scott Novy<br>District Judge<br>188th Judicial District Gregg County<br>101 E. Methvin St. Suite #408<br>Longview, TX 75601 |
| Appellant: | Frederick L. Brown, Appellant<br>3801 Silo Rd.<br>TDCJ Cole Unit<br>Bonham, TX 75418 |
| Appellant's Trial Counsel: | Bryan Owens<br>P.O. Box 182<br>Hilliard, FL 32046 |
| Appellant's Appellate Counsel: | Vincent Christopher Botto<br>300 N. Green St. Suite 315<br>Longview, TX 75601 |
| Appellee's Trial Counsel: | Kimberly Smith-Morris<br>Assistant Criminal District Attorney<br>101 East Methvin, Ste. 333<br>Longview, TX 75601 |
| Appellee's Appellate Counsel: | Tom B. Watson, Gregg County Criminal District Attorney<br>101 East Methvin, Ste. 333<br>Longview, TX 75601 |
| Appellee's Appellate Counsel: | Brendan Guy, Gregg County Assistant Criminal District Attorney<br>101 East Methvin, Ste. 333<br>Longview, TX 75601 |

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## RULES AND STATUTORY PROVISIONS

## STATEMENT REGARDING ORAL ARGUMENT

Appellant has raised an important constitutional question and believes that oral argument would help clarify the issues presented in his petition for discretionary review. Therefore, he respectfully requests oral argument.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES, FREDERICK L. BROWN Appellant in this cause, by and through his attorney of record, Vincent Christopher Botto, and, pursuant to the provisions of TEX.R.APP.PRO 66, et seq., moves this Court to grant discretionary review, and in support will show as follows:

## STATEMENT OF THE CASE

Appellant was charged by indictment in two counts. Count I alleged Assault Family Violence by impeding breath or blood. Included in the indictment was a jurisdictional prior for Assault Family Violence, increasing the punishment range from 2 to 10 years to 2 to 20 years in prison. CR-4. Count II alleged Assault Family Violence. The indictment included the same jurisdictional prior referenced above increasing the punishment range from up to 1 year in the county jail to 2 to 10 years in prison. CR-5. Appellant was found guilty of both counts by a jury and assessed 5 and 10 years imprisonment respectively. See CR-51-52 and 59-60. He timely perfected his appeal.

## STATEMENT OF PROCEDURAL HISTORY

Appellant presented four issues in his appellant brief. The conviction was affirmed in an opinion not designated for publication. Brown v. The State of Texas, No. 6-19-00082-CR (Tex. App. – Texarkana delivered November 27, 2019) (not designated for publication). This petition is due to be timely filed on December 27, 2019, and therefore, it is timely filed.

GROUND FOR REVIEW 1: THE COURT OF APPEALS ERRED WHEN IT HELD APPELLANT'S ACTIONS INVOKED THE FORFEITURE BY WRONGDOING DOCTRINE IN VIOLATION OF THE SIXTH AMENDMENT'S RIGHT TO CONFRONT ONE'S ACCUSER; IS NOT KNOWING THE LOCATION OF A WITNESS WRONGDOING, ESPECIALLY IF THE STATE WAS ABLE TO SERVE THE WITNESS WITH A SUBPOENA AFTER SAID ACTION?

## ARGUMENT

The Court of Appeals' opinion inaccurately recited the relevant facts by addressing only what was alleged to have occurred on June 25, 2018. In so doing the Court of Appeals relied heavily on inadmissible out of court statements. Failing to address the actions relating to subpoena service of the State's key witness, the Court of Appeals ignored the relevant facts relating to the State's invocation of the forfeiture by wrongdoing doctrine. *Brown v. State*, 2-3.

On June 25, 2018 Marco Gomez called 911 after he heard what he described as people fighting and what he thought was a slap. 3 RR 55-59. Officers responded to 1704 Hutchings and heard what sounded like glass being swept. 3 RR 62-63. Appellant stated to Officer Delgado he and his girlfriend were just getting into it. 3 RR 64. Officer Delgado separated the male and female identifying her as Lorie Hutzleman. 3 RR 65-70. It was at that time Hutzleman described being punched, choked and hit with a broom. 3 RR 65-69. The State of Texas, over objection, presented all of Hutzleman's out of court statements to the jury. Hutzleman did not testify.

Although served with a subpoena on April 12, 2019 Hutzleman did not appear for the guilt-innocence phase of trial. See 3 RR 14. On April 8, 2019 District Attorney Investigator, Hall Reavis, attempted to serve Hutzleman at Appellant's home. Appellant answered the door and informed Reavis he did not know where Hutzleman was and that she had family in Ohio. 3 RR 13. On April 12, 2019 Reavis successfully served Hutzleman with a subpoena, although she did shut the door on him during service. 3 RR 13. Reavis testified there was neither an indication that Hutzleman had been threatened concerning her appearance at trial or told not to appear by Appellant, nor did Appellant interfere with service of the subpoena to Hutzleman. 3 RR 18. The trial court received into evidence three screenshots from a Facebook profile

purporting to be Hutzleman's. 3 RR 16-17, 5 RR 6-11. The screenshots contained a photograph of Hutzleman and Appellant together. The picture was posted approximately one week prior to Reavis attempting to serve Hutzlman a subpoena. 3 RR 16-17. It is impossible to know when the photograph was taken. The trial court took judicial notice of a prior assault family violence conviction concerning Appellant and Hutzleman. 3 RR 18. Reavis testified there was no evidence indicating Appellant and Hutzleman were at the house together or interacted with one another in any way. 3 RR 19. After serving Hutzleman with the subpoena no further action was taken by the State of Texas to procure her appearance at trial.

The appellate court determined introduction of Hutzleman's out of court statements by the investigating officers did not violate the Sixth Amendment's right to confront and cross examine one's accuser due to the forfeiture by wrongdoing doctrine, Texas Code of Criminal Procedure Section 38.49.

The Court of Appeals expanded the forfeiture by wrongdoing doctrine allowing its application when the record does not show Appellant taking any action to thwart subpoena service or the victim's appearance at trial. *Brown* at 8. This interpretation is not faithful to the plain language of art. 38.49(1), requiring proof of wrongdoing by the party objecting to the evidence and testimony being sought. Review is therefore necessary pursuant to TEX.R.APP.PRO. 66.3(b) because the Court of Appeals has decided an important question of state law which has not yet been, but should be, determined by this Court, namely, whether the statutory requirement of Appellant committing some act of wrongdoing to procure the unavailability of a witness applies when there is no action presented and the State is still able to serve the witness with a subpoena even after the alleged malfeasance.

This Court has made it clear when construing a statute effect is given to the plain language of its text unless the text is ambiguous or doing so leads to absurd results. *Franklin v. State*, 579 S.W. 3d 382, 386 (Tex. Crim. App. 2019). Every word in the statute matters and it is presumed that the entire statute is intended to be effective. *Id. Dowthitt v. State*, 931 S.W. 2d 244, 258 (Tex. Crim. App. 1996).

The Statute in question, entitled "Forfeiture by Wrongdoing," plainly states in pertinent part:

> (a) A party to a criminal case who wrongfully procures the unavailability of a witness…
>
> (1) May not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and
>
> (2) Forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing.

TEX.CODE CRIM.PROC., art. 38.49(a). In order to justify the presentation of testimony or evidence from witnesses other than the accuser two prerequisites must be met: (1) the party objecting to the testimony or evidence must have acted wrongfully; and (2) that wrongful conduct is the reason the witness is unavailable. The appellate court's reading of the statute broadens the plain language to include non-action or inaction by Appellant to count for the wrongful procurement of the unavailability of a witness. It allows the trial court to imagine, not infer, some malfeasance on behalf of Appellant that in any other setting would not be conjured. This interpretation not only violates settled rules of statutory construction, it conflicts with established precedent.

The Court of Appeals has rendered the "wrongfully procure" requirement meaningless, because under its construction, simply showing the witness's absence is enough to show

"wrongful procurement" of said absence. The appellate court's application of this statute eliminates the need for the State to prove by a preponderance of evidence that Appellant acted wrongfully thus causing the witness's unavailability allowing the State to show the "wrongfulness" simply by the witness' absence.

This interpretation also conflicts with this Court's opinion in *Gonzalez v. State*, 195 S.W. 3d 114 (Tex. Crim. App. 2006) and *Colone v. State,* 573 S.W. 3d 249 (Tex. Crim. App. 2019). Both Gonzalez and Cologne killed the would-be witnesses thus procuring their unavailability at trial. Gonzalez murdered Maria Herrera, but before passing she described her assailant to responding officers. Gonzalez objected to the admission of Herrera's statements due the fact that his intent for murdering Herrera was not to keep her from testifying at trial but for other reasons. This Court ruled the forfeiture by wrongdoing doctrine may apply even if the act with which the accused is charged is the same act that procured the witness's unavailability. *Gonzalez* at 125. More importantly, after a long discussion of the forfeiture by wrongdoing progeny, it is clear, some action by Appellant is required to keep the witness from appearing. As nearly all the cases discussed by *Gonzalez* and *Colone* speak to the ultimate action to silence a witness, killing that witness, expanding such a doctrine to include non-action is unwarranted and creates a conflict. Because of this conflict, review is appropriate. TEX.R.PRO. 66.3(c)

In this case, no evidence was presented showing any wrongdoing by Appellant. There is certainly no proof indicating a single action taken by Appellant kept Hutzleman from testifying. Even if Appellant's statement to Investigator Reavis on April 8, 2018 can be construed as deceitful (although there is nothing in the record suggesting that to be the case), Reavis was still able to serve Hutzleman with a subpoena subsequent to his discussion with Appellant and prior to jury selection. The Court of Appeals has conflated a witness's absence with Appellant's

perceived or imagined action. The rationale must go, because Hutzleman was absent, Appellant is the reason. That is in direct conflict with the statute and the cases handed down by this Court and the United States Supreme Court. A witness's absence is not enough, the Appellant must have acted wrongfully to procure that absence. There is no evidence of such action in this case.

No other appellate court has taken the doctrine this far. Two cases that do not involve causing the death of a potential witness are *Tarley v. State*, 420 S.W. 3d 204 (Tex. App. – Houston [1st] 2014) and *Schindler v. State*, No. 02-17-00241-CR (Tex. App. – Ft. Worth 2018). In *Tarley*, Appellant asked the witness to deny the assault had occurred. The witness refused to deny the assault. Tarley then spent the next two weeks preventing the witness from leaving their apartment, slapped her, pulled her hair and beat her with a belt. After escaping the witness gave a statement to an officer and fled to Florida. *Tarley* at 205-206. In *Schindler*, perhaps the case with the least evidence of wrongdoing, the witness indicated Appellant had been violent in the past, access to firearms, threatened to killer her, threatened to kill himself, attempted suicide, and been violent when she tried to leave or talked about leaving. When the investigator attempted to serve the witness with a subpoena, Schindler used his truck to trap the investigator inside his vehicle while the witness fled in a different car. *Schindler* at 12-13.

The instant case is the first where a comment from Appellant to the investigator prior to actual subpoena service qualifies as wrongful procurement. Review is therefore proper pursuant to TEX.R.APP.PRO 66.3 (a).

GROUND FOR REVIEW 2.

THE COURT OF APPEALS ERRED WHEN IT HELD THE WITNESS WAS UNAVAILABLE TO TESTIFY EVEN THOUGH SHE HAD BEEN SERVED WITH A SUBPOENA AND THE STATE OF TEXAS MADE NO FURTHER EFFORT TO SECURE HER APPEARANCE.

## ARGUMENT

On April 12, 2019 District Attorney Investigator, Hall Reavis, served Lorie Hutzleman with a subpoena to appear in court the following Monday, April 15, 2019. See CR-17-19. The trial court followed customary procedures in Gregg County, picking a jury on Monday morning and starting the State's case in chief Tuesday. This gives the State of Texas an opportunity to seek out a difficult witness who did not show Monday morning. There is no indication in the record the State took any further action past serving Hutzleman with a subpoena to procure her appearance at trial.

The appellate court determined Hutzleman's absence on Monday April 15, 2019 was enough to qualify her as "unavailable" for purposes of invoking the forfeiture by wrongdoing statute, Texas Code of Criminal Procedure Section 38.49.

Forfeiture by wrongdoing requires two elements, the witness is unavailable to testify and the reason for said unavailability is directly linked to some act of wrongdoing by the Appellant. The Court of Appeals expanded the forfeiture by wrongdoing doctrine allowing its application when the record does not show the witness to be unavailable. The appellate court conflated absenteeism with unavailability. This interpretation is not faithful to the plain language of art. 38.49(1), requiring the State to show reasonable effort to procure the witness' appearance at trial. Review is therefore necessary pursuant to TEX.R.APP.PRO. 66.3(b) because the Court of Appeals has decided an important question of state law which has not yet been, but should be, determined by this Court, namely, whether the statutory requirement of the witness being unavailable can be met after subpoena service and with no further action taken by the State to assure the witness's appearance.

Texas Code of Criminal Procedure 38.49(1) is clear, an Appellant's wrongful act must make the witness unavailable. In order to justify invoking the forfeiture by wrongdoing doctrine the State must show both the unavailability of the witness and Appellants inappropriate action that caused the witness to be unavailable. Rule 804 of the Texas Rules of Evidence defines the ways a witness is declared "unavailable". Rule 804(a)(5) states a witness is unavailable when the witness is absent, and the State has not been able to procure their presence by service or other means. TEX.R.EVD. 804. The appellate court's reading of the statute incorrectly conflates absenteeism with unavailability. This interpretation not only violates settled rules of statutory construction, it conflicts with established precedent. The Court of Appeals has rendered the "procure by service or other means" part of the unavailability definition meaningless, because under its construction an absent witness is an unavailable witness regardless of the State making no effort to secure the witness's presence.

This interpretation conflicts with the United States Supreme Court's opinions in *Barber v. Page*, 390 U.S. 719 (1968) and *Ohio v. Roberts*, 448 U.S. 56 (1980). In *Barber* the State made no attempt to bring a co-defendant witness to testify because he was located 225 miles away in a federal prison. The Court held "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Id.* at 724. *Barber* explained further to apprise oneself of the unavailability exception to the Sixth Amendment the prosecutorial authorities must make a good-faith effort to obtain a witness' presence at trial. *Id.* at 725. *Ohio v. Roberts* explained good-faith demands the State to take measures to procure a witness "if there is a possibility, albeit remote, that affirmative measures might produce the declarant." *Ohio* at 74. It is the States burden to establish they have made good-faith efforts to produce the witness. Additionally, this interpretation conflicts with this Court's opinion in *Woodall v.* State, 336 S.W. 3d 634 (Tex.

Crim. App. 2011) and *Brown v. State*, 907 S.W.2d 835 (Tex. Crim. App. 1995). In *Woodall* the Court is clear, seek a writ of attachment and exhaust all possible avenues to secure the appearance of the witness before declaring them unavailable. In *Brown* the State failed to seek a writ of attachment for Beasley, a Department of Public Safety Chemist, and in so doing abandoned its claim of witness materiality. In making these rulings the Courts have implicitly held some effort must be made beyond simply serving the witness a subpoena in order to claim unavailability of that witness. Because of this conflict, review is appropriate. TEX.R.APP.PRO. 66.3(c).

In this case the State served Hutzleman with a subpoena two days before she was requested to appear. When she did not appear Monday morning prior to jury selection the State could have requested a writ of attachment. It did not. The State could have gone back to the place where It served the subpoena. It did not. The State made no effort of any kind to assure Hutleman's presence at the trial. The conclusion that mere service of a subpoena qualifies as taking good-faith measures to assure a witness' presence conflicts with *Barber, Ohio, Woodall* and *Brown*.

The appellate court's ruling conflicts with other Court of Appeals opinions as well. In *Reed v. State*, 312 S.W. 3d (Tex. App.—Houston [1st] 2010), the court outlined what good-faith efforts looked like. Exhausting all contacts with family and friends and having no knowledge of the witness's location proved further efforts would be futile. In *Reyes v. State*, 845 S.W. 2d 328 (Tex. App. El Paso 1992), the appellate court explained issuing a subpoena, calling the witness' grandmother to assist, getting help from another relative and receiving information the witness was in Mexico was not due diligence or reasonable good-faith to procure the witness's

availability because the State did not contact Mexican authorities or attempt any formal proceedings to find the witness.

In the instant case the State did nothing beyond serving a subpoena. It did not call upon its Special Investigations and Apprehensions Unit as has been done many times in the past. Not a single family member or friend was contacted to assist, and there was no attempt to make contact again after serving the subpoena. Review is therefore proper pursuant to TEX.R.APP.PRO 66.3(a) because the Court of Appeal's decision conflicts with another appellate court decision on the same issue.

## PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays this Court grant discretionary review and, after full debriefing on the merits, issue an opinion reversing the Court of Appeals' judgment and remanding the cause to the trial court for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify, by affixing my signature above, that a true and correct copy of the foregoing Petition for Discretionary Review, was mailed through the U.S. Postal Service to Brendan Guy, Office of the Gregg County Criminal District Attorney, 101 E. Methvin St. Longview, Texas 75601, and was mailed through the U.S. Postal Service to Stacey Soule, State Prosecuting Attorney, P.O. Box 12405 Capitol Station, Austin, Texas 78711, on this day, December 26, 2019.

## CERTIFICATE OF COMPLAINCE

Appellant's Petition For Discretionary Review contains 3,655 words.

Vincent Christopher Botto


# In The
# Court of Appeals
# Sixth Appellate District of Texas at Texarkana

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No. 06-19-00082-CR

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FREDERICK L. BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 188th District Court
Gregg County, Texas
Trial Court No. 47,806-A

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Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

## MEMORANDUM OPINION

In a single trial, Frederick L. Brown was convicted of (1) the second-degree felony offense of family violence assault by impeding the normal breathing or blood circulation of Lori Hutzelman[1] and (2) the third-degree felony offense of family violence assault[2] against Hutzelman. Brown was sentenced to concurrent prison terms of five years and ten years, respectively. On appeal, Brown claims that (1) the trial court erred in admitting Hutzelman's out-of-court statements in violation of Brown's right of confrontation, (2) the evidence is insufficient to support a finding that he is the same person listed in a certified prior judgment for family violence assault, and (3) the trial court erred in denying his request for a mistrial. For the reasons stated below, we affirm the trial court's judgment.

### I. Factual and Procedural Background

In June 2018, a resident of 1707 Hutchings Street in Longview called 9-1-1 to report a black male and a white female fighting outside 1704 Hutchings Street. He stated that he heard the man slap the woman and the woman screaming that she was bleeding. Patrol officers responded to the call at 1704 Hutchings and knocked on the door. Brown, who was sweeping glass from the living room floor, explained that he and his girlfriend were "just getting into it." Hutzelman was sitting on the couch and seemed scared. When interviewed by officers, Hutzelman explained that she and Brown argued and that he began to assault her. Hutzelman stated that Brown punched her in the stomach and then struck her with a broom ten times on the shoulders and upper torso area.

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[1] *See* TEX. PENAL CODE ANN. § 22.01(b-3) (Supp.).

[2] *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(A) (Supp.).

According to Hutzelman, Brown then dropped the broom and grabbed her around the throat and began to choke her. Hutzelman was able to free herself from Brown when she kicked him. She stated that she then tried to leave. Hutzelman stated that, once she was outside, Brown hit her in the head and pulled her back inside the house by her hair. Hutzelman had red marks on her throat, bruising on her left arm, and a broken blood vessel in her eye.

## II. Forfeiture by Wrongdoing

When police officers responded to a neighbor's 9-1-1 call to report domestic violence, Hutzelman told officers that Brown had repeatedly struck her with a broom and that he had choked her. Although Brown objected to the officers' testimony about these statements on confrontation grounds, the trial court determined that the doctrine of forfeiture by wrongdoing applied, thus barring Brown from asserting his right of confrontation. On appeal, Brown claims this ruling was in error.

### A. Standard of Review

In reviewing the trial court's decision to admit or exclude evidence under the doctrine of forfeiture by wrongdoing, we apply an abuse of discretion standard. *Shepherd v. State*, 489 S.W.3d 559, 572 (Tex. App.—Texarkana 2016, pet. ref'd). Under this standard, we will uphold the trial court's ruling if it falls within the "zone of reasonable disagreement" and is "correct under any theory of law applicable to the case." *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). The trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Where, as here, there are no findings of fact, "we review the evidence in the light most

favorable to the court's ruling and assume the court made findings that are supported by the record." *Shepherd*, 489 S.W.3d at 572–73 (citing *Carmouche v. State*, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000)). "Based on our standard of review, we have no choice but to defer to the trial court's discretion on such issues, even if we would have decided them differently," *Id.* at 573 (citing *State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007)), and will uphold an evidentiary ruling if it "is correct on any theory of law applicable to that ruling," *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

**B. Analysis**

The Sixth Amendment guarantees a criminal defendant the right to be confronted with the witnesses against him. *Giles v. California*, 554 U.S. 353, 357–58 (2008); *Gonzalez v. State*, 195 S.W.3d 114, 116 (Tex. Crim. App. 2006); *Shepherd*, 489 S.W.3d at 573. That said, "Under forfeiture by wrongdoing, the defendant is barred from asserting his right of confrontation when he has wrongfully procured the unavailability of the witness." *Shepherd*, 489 S.W.3d at 573. Under this doctrine, "there must be some showing by the proponent of the statement that the defendant intended to prevent the witness from testifying." *Id.* (citing *Giles*, 554 U.S. at 361–62). The forfeiture by wrongdoing doctrine has been codified in Article 38.49 of the Texas Code of Criminal Procedure. *See id.* at 574 ("[T]he requirements of Article 38.49 substantially correspond with the requirements for forfeiture by wrongdoing set out in *Giles*."). Article 38.49 provides:

> (a) A party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness:
>
> (1) may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and

(2) forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing.

(b) Evidence and statements related to a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness are admissible and may be used by the offering party to make a showing of forfeiture by wrongdoing under this article, subject to Subsection (c).

(c) In determining the admissibility of the evidence or statements described by Subsection (b), the court shall determine, out of the presence of the jury, whether forfeiture by wrongdoing occurred by a preponderance of the evidence. If practicable, the court shall make the determination under this subsection before trial using the procedures under Article 28.01 of this code and Rule 104, Texas Rules of Evidence.

TEX. CODE CRIM. PROC. ANN. art. 38.49.

In accordance with Article 38.49(c), the trial court held a hearing outside the jury's presence to determine "whether forfeiture by wrongdoing occurred by a preponderance of the evidence." TEX. CODE CRIM. PROC. ANN. art. 38.49(c).

At the Article 38.49 hearing, Hall Reavis, the chief investigator for the Gregg County District Attorney's Office, testified that he first attempted to locate Hutzelman at her last known address on Hutchings Street in Longview on April 8 to serve her with a trial subpoena for April 16. Brown answered the door, told Reavis that Hutzelman was not there, and stated that the two were no longer a couple. Brown could not state with any specificity when he last saw Hutzelman and told Reavis that he did not know where to find her but that she was from Ohio and had family there. According to Reavis, Brown was not "real cooperative." Reavis returned to the Hutchings Street residence the next day to serve the subpoena. When no one answered the door, Reavis

waited down the street and eventually saw Brown leave the house. Reavis again tried to serve the subpoena, but no one answered the door.

Reavis next returned to the Hutchings Street residence on the morning of April 12. Reavis had seen Brown in court that morning and believed Hutzelman was home, "[b]ased on some other information that [he] was picking up." After he knocked on the door "numerous times," a white female that he recognized as Hutzelman answered the door. When Reavis told Hutzelman that he had a subpoena for her from the district attorney's office, she slammed the door. Reavis left the subpoena in the door and told Hutzelman through the door that she had been served and that she was required to be in court on Monday.[3]

Reavis explained that he looked at Hutzelman's Facebook page when he was attempting to locate her. In doing so, he discovered that Hutzelman posted a profile picture with Brown on April 1. The photograph of Hutzelman and Brown was captioned "Together We Stand Strong." Hutzelman also posted a video recording on April 1 captioned "Me and my baby at the scrapyard" that depicted Brown and Hutzelman.[4] At the end of the hearing, the trial court took judicial notice of a prior family violence assault case against Brown in which Hutzelman was also the victim. After reviewing the evidence, the trial court determined that the State met its burden of proof by a

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[3]Hutzelman did not appear in court in accordance with the subpoena.

[4]Although Brown did not object to Reavis' testimony about Hutzelman's Facebook photos, he did object to the photos because they were not properly authenticated. The trial court overruled Brown's objection. Brown claims this was error. Article 38.49(c) specifically provides that the hearing is to be conducted in accordance with Rule 104 of the Texas Rules of Evidence. TEX. CODE CRIM. PROC. ANN. art. 38.49(c). Rule 104(a) provides that, when "[t]he court must decide any preliminary question about whether . . . evidence is admissible[,] . . . the court is not bound by evidence rules, except those on privilege." TEX. R. EVID. 104(a); *see Gonzalez v. State*, 195 S.W.3d 114, 124 n.41 (Tex. Crim. App. 2006).

preponderance of the evidence under Article 38.49. The trial court therefore ruled that the State was free to introduce Hutzelman's statements to the police at trial.

Brown claims that the State did not establish, by a preponderance of the evidence, that he procured Hutzelman's unavailability to testify at trial. We disagree. A mere seven days before Reavis' first attempt to serve Hutzelman with a trial subpoena, Hutzelman's Facebook post depicted Brown and her together, standing strong. Yet, Brown told Reavis that he and Hutzelman were no longer together on April 8 and that he did not know how to locate her. Only four days later, Hutzelman answered the door of the Hutchings Street residence she evidently shared with Brown and was served with the trial subpoena.[5] This evidence indicates that Brown deceived Reavis about the status of his relationship with Hutzelman in an attempt to thwart Reavis' efforts to serve Hutzelman with the subpoena.

Along with the foregoing evidence, the trial court also considered evidence of a prior assault committed by Brown against Hutzelman. The United States Supreme Court has recognized that the doctrine of forfeiture by wrongdoing has relevance in domestic violence cases:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. . . . Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

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[5]Brown contends that Hutzelman was not unavailable because the State did not serve her with a writ of attachment. This argument appears to be based on the Rule 804 exceptions to the rule against hearsay when the declarant is unavailable as a witness. *See* TEX. R. EVID. 804. Because the trial court acted within its discretion in admitting Hutzelman's statements to officers in accordance with Article 38.49 of the Texas Code of Criminal Procedure, we need not address this issue. *See* TEX. CODE CRIM. PROC. ANN. art. 38.49. It also does not appear in the record before us that this specific complaint was made in the trial court. *See* TEX. R. APP. P. 33.1.

*Giles*, 554 U.S. at 377; *see also Giles*, 554 U.S. at 380 (Souter, J., concurring) ("[T]he element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."). The trial court acted within its discretion in admitting Hutzelman's statements to law enforcement based on Brown's actions in trying to hinder service and on the parties' prior relationship in which Hutzelman was assaulted. The trial court could infer that Hutzelman's sharply negative response to Reavis when she opened the door to him resulted from her fear of cooperating in the prosecution of the case. *See Tarley v. State*, 420 S.W.3d 204, 206 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (holding that the trial court could infer from evidence that second assault of victim was designed to keep her from testifying). We hold that the trial court acted within its discretion in finding forfeiture by wrongdoing and in admitting Hutzelman's June 25, 2018, statements to officers.

## III. Evidence of Prior Conviction Was Sufficient

Both counts of the indictment against Brown included the allegation that he had previously been convicted of an offense

> under Chapter 22, Penal Code, against a member of said Defendant's family and household and with whom the said Defendant has had a dating relationship, as described by Chapter 71, Family Code, to-wit: on the 24th day of October, 2015, in the County Court at Law #1 of Gregg County, Texas, in cause number 2014-1820.[6]

[6]This allegation states that Brown was previously convicted in October 2015. The prior conviction entered into evidence by the State was dated October 2014.

Proof of this allegation was required to increase the level of offense in count I of the indictment from a third-degree felony to a second-degree felony and to increase the level of offense in count II of the indictment from a Class A misdemeanor to a third-degree felony. *See* TEX. PENAL CODE ANN. § 22.01(b-3), (b)(2)(A).

"To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction." *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). "No specific document or mode of proof is required to prove these two elements." *Id.* "In proving prior convictions, identity often includes the use of a combination of identifiers, and '[e]ach case is to be judged on its own individual merits.'" *Henry v. State*, 466 S.W.3d 294, 301 (Tex. App.—Texarkana 2015), *aff'd*, 509 S.W.3d 915 (Tex. Crim. App. 2016) (quoting *Littles v. State*, 726 S.W.2d 26, 30–32 (Tex. Crim. App. 1984) (op. on reh'g)). The State is entitled to use circumstantial evidence to prove that the defendant is the same person named in the alleged prior convictions, and proof may be made "in a number of different ways." *Flowers*, 220 S.W.3d at 921. "The totality of the circumstances determines whether the State met its burden of proof." *Henry*, 466 S.W.3d at 301 (citing *Flowers*, 220 S.W.3d at 923).

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal

sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

At trial, the State offered, and the trial court admitted into evidence without objection, a certified copy of a judgment against "Fredrick L. Brown" for family violence assault in the County Court at Law #1 of Gregg County, Texas, in cause number 2014-1820. Brown contends that simply proving that he has the same name as the person named in the prior conviction is not sufficient to link him to the prior conviction. We agree. "Unless the defendant's name is unique, a name and signature are insufficient by themselves to link a defendant to a prior conviction." *Barnes v. State*, No. 06-19-00045-CR, 2019 WL 4686488, at *4 (Tex. App.—Texarkana Sept. 25, 2019, pet. filed) (citing *Strehl v. State*, 486 S.W.3d 110, 114 (Tex. App.—Texarkana 2016, no pet.) ("Evidence that the defendant merely has the same name as the person previously convicted is not sufficient to satisfy the prosecution's burden.")). "Even having two prior convictions for the same offense committed in the same county is legally insufficient, standing alone, to prove beyond a reasonable doubt that [the defendant]" was the subject of the prior conviction. *Strehl v. State*, 486 S.W.3d 110, 114 (Tex. App.—Texarkana 2016, no pet.).

Yet, Brown ignores other evidence that we must consider in our determination of whether the State carried its burden of proof. Officer Jonathan Wolf of the Longview Police Department testified that Brown told him—as recorded on Wolf's body camera on the night of June 25—that

his date of birth was "5/19/67." The State also published Wolf's body camera recording to the jury as exhibit 12 on which Brown can be heard stating to Wolf that his birth date was "5/19/67." Although the judgment in cause number 2014-1820 does not list a date of birth for Fredrick L. Brown, the fingerprint card in cause number 2014-1820 lists the defendant's date of birth as May 19, 1967. At the time of his arrest in this case, Brown lived in Longview, Gregg County, Texas. The October 2014 conviction for family violence assault emanated from the County Court at Law #1 of Gregg County, Texas.

Here, Brown is linked to the prior conviction by name, birth date, type of offense, and county of offense. The evidence shows not only that the name in the previous judgment was the same as that of the defendant, but also shows that both offenses were committed in the same county and that both offenses—committed within four years of each other—were for family violence assault. The evidence here also established that the defendant in both cases was born on May 19, 1967. Given these facts, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Brown was the same defendant convicted of family violence assault in the 2014 Gregg County judgment. *See Smith v. State*, 401 S.W.3d 915, 920 (Tex. App.—Texarkana 2013, pet. ref'd) (name, date of birth, and partial matching social security number sufficient to link defendant to prior conviction). We, therefore, overrule this point of error.

## IV. Brown Did Not Preserve Error on His Mistrial Complaint

At the end of the guilt/innocence phase of the trial, the jury returned its verdict finding Brown guilty of both counts I and II as alleged in the indictment. After the jury returned its verdict, Brown moved for a mistrial on the basis that the jury was improperly voir dired on the wrong

penalty range. He claimed the panel was told the range of punishment was two to ten years.[7] The State argued that the jury did not deliberate on punishment during the guilt/innocence phase of the trial. The State also pointed out that only the State would be harmed if the jury could not consider an increased range of punishment. The trial court denied the motion for mistrial.

On appeal, Brown claims that the trial court improperly denied his motion for mistrial based on the trial court's failure to properly admonish him as to the range of punishment as required by Article 26.13(a)(1) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (Supp.).[8] Because this objection was not made at trial, we may not address it on appeal. "The point of error on appeal must correspond or comport with the objection made at trial." *Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998) (op. on reh'g)). "Where a trial objection does not comport with the issue raised on appeal, the appellant has preserved nothing for review." *Id.*; *see* TEX. R. APP. P. 33.1. Because the trial objection was based on improper jury voir dire, Brown has not preserved for our review his complaint that the trial court did not properly admonish him in accordance with Article 26.13(a)(1) of the Texas Code of Criminal Procedure.[9]

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[7]Brown was convicted, in accordance with count I of the indictment, of a second-degree felony, which carries a punishment range of two to twenty years' imprisonment.

[8]Brown also seems to imply by his argument that, because the State did not voir dire on an enhanced punishment range of two to twenty years in prison, Brown was unaware that he was facing up to twenty years in prison. This argument was not brought as a separate point of error and was not briefed. *See* TEX. APP. P. 33.1.

[9]We note that Article 26.13 applies when the defendant enters a plea of guilty or nolo contendere. TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Supp.). Here, Brown's plea was not guilty.

## V. Conclusion

We affirm the trial court's judgment.

Scott E. Stevens
Justice

Date Submitted: November 6, 2019
Date Decided: November 27, 2019

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